United States Circuit Court. Southern District of New York. In Equity.

MARY E. BUNCE AND OTHERS *v.* JANE A. GALLAGHER AND MICHAEL SMITH.

Where a person bought and took possession of a house under a forged deed, the true owner is entitled, on a bill in equity, to have the deed and the record of it declared void, and the deed delivered up to be cancelled, and the purchaser enjoined from assuming to sell the house to any one else.

It is not necessary that the title of the plaintiff should be established and possession obtained by an action at law.

The owner having in the trial of his complaint given the forged deed in evidence, is entitled to prove the forgery.

Where the holder of the legal title is a plaintiff, the misjoinder of other parties having an equitable interest will be disregarded unless the objection be taken by demurrer or answer before answer on the merits.

OPINION by

SHIPMAN, J.—The complainants are citizens of Connecticut and Massachusetts, and the respondents, citizens of New York. The bill is brought to obtain the decree of this court annulling and declaring void a certain alleged forged deed, and the record thereof, purporting to convey to the respondent Gallagher the title to a house and two lots of land situated on Staten Island, in the state of New York, and removing the cloud on the genuine title which this alleged forged instrument has thrown over it; and also to cancel a certain agreement entered into between the respondents for the sale and transfer of the premises in question to the respondent Smith, and to restrain them from consummating the same, or any similar contract.

Though the objects sought by the bill are simple, the facts and legal questions involved in the controversy are numerous and complicated. A detailed statement of the material facts is therefore indispensable to a clear understanding of the points to be decided. Mary E. Bunce, one of the complainants, is a daughter of the late John W. Bull, of Hartford, Connecticut. In September 1861, he gave her full power of attorney to transact all his business.

On the 4th of April 1862, she purchased for her father, under this power of attorney, the house which is the subject of this controversy, and took the deed in her own name. The consideration, however, came from his estate, and she held the property avowedly for his benefit.

This property, which lies in the town of Southfield, New York, was purchased subject to a mortgage, which was subsequently foreclosed, and a sale made by the sheriff of Richmond county. Mary E. Bull, assuming to act as her father's agent, under the letter of attorney, purchased in the property, and as before, and for the same reasons, and with the same object, took the deed in her own name. This sheriff's deed was executed March 20th 1863. Thus Mary E. Bull became invested with the legal title to this property by the two deeds referred to, both of which were duly recorded in the office of the clerk of Richmond county.

On the 9th of July 1863, John W. Bull died, leaving five children, viz., the four who have joined in this bill, and John W. Jr. He left a will, dated the 10th of May 1858, which was duly proved before the Court of Probate for the District of Hartford, July 15th 1863. One of the terms of this will was that all future acquisitions of real estate should be embraced in and pass by it. After a specific devise of the homestead of the testator in Hartford, with the furniture and movable property connected with it, to his two daughters, the remainder of his estate, real and personal, is given to the two daughters and sons who are named as complainants in this bill. Nothing was given, by the will, to the other son, John W. Bull, Jr.

On the 23d of May 1864, Mary E. Bull executed and delivered a deed of this property on Staten Island, together with other real estate therein described, to Henry R. W. Welch, one of the complainants in this bill, in trust. On the same day, Welch executed an instrument, purporting to be a declaration of the trust under which he received this deed from Mary E. Bull, and sets forth, so far as this property is concerned, that he holds it as trustee for all the devisees named in the will of John W. Bull, who are declared to be the equitable owners thereof.

On the 28th of May 1864, Mary E. Bull was married to Francis M. Bunce, who is also joined as a complainant in the bill.

In 1865, two instruments were found on record in Richmond county, describing the house and lots; one a mortgage purporting to be signed and acknowledged by Mary E. Bull, to secure the payment of $1060 to Harriet G. and Louisa Moore, and dated December 15th 1863; the other an absolute deed, also purporting to be signed and acknowledged by Mary E. Bull, dated March

2d 1864, conveying the premises to Jane Ann Gallagher. Both these deeds were signed with the name of Mary E. Bull.

On the trial it was proved that these deeds had been executed by an impostor. She did not even resemble the genuine Mary E. Bull. She succeeded, however, in passing herself off as such, deceiving the counsel, to whom the genuine Mary E. Bull was a stranger, and obtaining the money of the Moores and of Mrs. Gallagher. The mortgage and deed were recorded in the clerk's office in Richmond county, and Mrs. Gallagher, with her husband, went into possession on the 14th of March 1864. Her husband subsequently died, but Mrs. Gallagher has continued in possession of the premises by herself and tenants till the present time. Among her tenants was Michael Smith, the other respondent in this bill, with whom Mrs. Gallagher entered into negotiations for the sale of this property to him.

Of course this mortgage to the Moores and the deed to Mrs. Gallagher are mere forgeries, and conveyed no title. The bill is brought to annul the deed to Mrs. Gallagher, to require her to deliver it up to be cancelled, and to declare the record of it void, and also to restrain her and Smith by injunction from consummating their negotiations for the sale of the property to him, and to prevent her from assuming to sell it to any one else.

There can be no dispute as to the facts. The proof is overwhelming that neither Mary E. Bunce (formerly Mary E. Bull) nor any one of the other complainants, nor any other person who had any right or title to this property, had any knowledge, or were in law chargeable with any knowledge of this pretended deed, or the possession of Mrs. Gallagher under it, until about a year after its execution and the entry of Mrs. Gallagher, who had been thus unwittingly made the victim of a fraud and imposture. The defence to the bill is therefore technical, and turns upon questions of law.

The respondents insist:—

1st. That this court has no jurisdiction, at least in the present state of things, as the complainants, or real owners, have adequate remedy at law, and must first resort to ejectment, and settle the title and obtain possession of the premises.

2d. That the bill should be dismissed for a misjoinder of parties complainant.

3d. That improper evidence was received on the trial, which, if rejected, leaves material allegations of the bill without proof.

We will consider first whether the complainants have adequate remedy at law in the just and proper sense of that term. This is important, inasmuch as the 16th section of the Judiciary Act provides, "That suits in equity shall not be sustained by either of the courts of the United States where a plain, adequate, and complete remedy at law can be had." It has been held that this provision is merely declaratory, and does not exclude the courts of the United States from any part of the field of equitable remedies: *Baker* v. *Riddle*, 1 Bald. 405; *Boyce* v. *Grundy*, 3 Peters 210. In the latter case Mr. Justice JOHNSON, in delivering the opinion of the court, uses this emphatic language: "This court has often been called upon to consider the 16th section of the Judiciary Act of 1789, and as often, either expressly, or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is remedy at law; it must be plain and adequate; or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." The question, then, arises whether the bill before us, on the general principles of equity jurisprudence, presents a case of equity jurisdiction. And it is proper to remark here that the fact that the deed in question is a void instrument does not take the case out of the jurisdiction in equity: *Piersoll* v. *Elliott*, 6 Peters 95; *Hamilton* v. *Cummins*, 1 Johns. Ch. R. 517. Numerous authorities might be cited in support of this doctrine, but it is not necessary in the present case, as the respondents' counsel concede the point. They, however, insist that before the complainants can come into a court of equity for the relief sought by this bill, they, or whoever is the legal owner, must establish title and obtain possession by ejectment at law. The argument at bar in support of this claim proceeded upon the assumption that the bill presented the case of a doubtful and disputed title, and that as courts of equity do not adjudicate simple questions of title to land, no relief can be granted. But this difficulty is not presented by the bill. There is no question of title involved between the complainants and the respondents, except that involved in the question whether the deed is forged or not. This forged deed has not impaired or

complicated the title to this land. It has thrown a cloud over it, especially as it stands on the records of lands in the county where the property is situated, and this cloud obscures the true state of the title, and is well calculated to lead to misapprehension, embarrassment, and mistaken litigation. As the invalidity of the deed does not appear on its face, but can only be made apparent by extrinsic evidence, it is peculiarly the duty of a court of equity to sweep it away. The case of *Ward* v. *Dewey*, 16 N. Y., cited by the respondents on the point, concedes this doctrine. PRATT, J., at p. 522, says: "But where such claim appears valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud on the title. *The case of fraud in procuring a deed to be executed which apparently conveys the title* * * * is a familiar illustration." There is here no controversy about a doubtful title between these parties, and the question of possession has no legal relation to the object now sought to be attained by the decree of this court.

But it is said there is great doubt as to which of the complainants holds the legal title, and as the equitable power of the court can only be exercised in aid of the legal owner, the legal owner must be ascertained before the court can entertain jurisdiction. But this objection goes only to the question whether the proper parties have been made complainants in the bill. Some one is entitled to have this spurious and fraudulent deed which now clouds the title to this property swept off. Whether that right pertains to these complainants we will now consider, in disposing of the respondents' second main objection, viz., that there is an improper joinder of parties complainant.

As a general rule all the parties in interest should be joined in a bill either as complainants or respondents, whether these interests be equitable merely, or legal. While it is not always necessary to join all who have an interest in the subject-matter of the suit, those who have an interest in the object sought to be attained by the suit must be joined: Story's Eq. Plead., §§ 72–136 *et seq.* Those whose interests are in harmony, and only those, should be joined as complainants: *Saumerez* v. *Saumerez*, 4 M. & C. 336. Now, it is evident that the interests of all the devisees of John W. Bull, named in the bill, are in harmony. There is not only

no conflict or variance between these interests, but all these devisees are concerned in the relief which this bill seeks. This will be seen by recurring to facts already stated. Mary E. Bull purchased this property with her father's money, avowedly as his agent, taking the title in her own name solely as a matter of convenience and to enable her to transfer it with facility. She had been acting under a power of attorney given her by her father when he was competent to execute such an instrument. But at the time she purchased this property of Root, as well as at the time when the sheriff's deed was made to her, her father's mental powers had so far decayed as to render him incapable of legally transacting any business. The authority, therefore, conferred upon her originally by this letter of attorney was extinguished, or, at least, suspended, by his mental incapacity. This is well-settled doctrine, though it has been intimated that before the authority of an agent can be suspended by the insanity of the principal occurring after the execution of the power, the fact of lunacy must be established under an inquisition. Still, I apprehend, that whether the fact were formally established or not, the agent could not justify or support an act upon the authority originally given, done after the agent had knowledge of the incapacity of his principal: Story on Agency 481, note. But this question is not material here. Mary E. Bull evidently acted under the mistaken idea that the authority conferred upon her by the power of attorney was still in force. But, whatever her notion was, she acted in good faith, purchasing this property for and on account of her father, as she supposed, in the interest of his estate, paying for it out of his funds, and avowedly holding it for his benefit. She held the legal title, but the property in equity belonged to him. By his will, his equitable interests passed to his devisees, though one of them, the daughter, continued to hold the legal title. But it is objected that the four complainants, who are devisees under John W. Bull's will, are in no condition to maintain any suit touching real estate in the state of New York, because the will has never been proved and admitted to probate in the latter state.

But this suit ought not to fail upon a merely formal and technical point like this. Courts of equity are slow to dismiss suits for want of proper or the joinder of improper parties, where the difficulty can be remedied, or where they can give the relief sought without impairing or jeopardizing the interest of any one.

Rather than that the suit should fail, I should feel bound to withhold the decree until this supposed defect could be cured by a probate of the will in this state.

But in the first place it is doubtful whether it was indispensable for any one of these devisees, *as such*, to be joined as complainants. The holder of the legal title could maintain the bill without compromising any of the rights given by the will. But joining those who have equitable interests in the subject-matter would be unobjectionable, or at least, if the misjoinder is apparent on the face of the bill, it should have been taken advantage of by way of demurrer, or, at all events, by answer. Now the will of John W. Bull, the deed of Mary E. Bull to Welch, in trust, and the declaration in trust by the latter executed at the same time as the deed, are referred to in the bill and annexed thereto as exhibits. The alleged misjoinder was, therefore, apparent on the face of the bill, and should have been taken advantage of by demurrer.

Mr. Justice Story, in his Equity Pleadings, § 544, says, "In cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer, for if not so taken, and the court proceeds to a hearing on the merits, it will be disregarded, at least if it does not materially affect the propriety of the decree." The bill shows that these devisees claim an interest in this property under the will of their father, who died in Connecticut, the place of his domicil, where his will was proved and his estate went into settlement. There is no allegation that the will was proved in New York. The misjoinder alleged is put upon the ground of want of interest, but this was apparent on the bill, and as it was not demurred to, must be deemed to have been waived: 4 Paige 510.

Certainly the court cannot regard it in the present stage of the suit, especially as this misjoinder, if it be one, in no way affects the propriety of the decree asked for, either as that decree may affect the interests of complainants or respondents.

But the propriety of making Mary E. Bull, one of the devisees, a party complainant, is not open to objection of any kind, for she holds the legal title to this property under the sheriff's deed to her. Her deed to Welch, on the 23d of May 1864, was void under the statute of New York. She was out of possession, though she did not know it at the time. Mrs. Gallagher was in

possession under color of title. The fact that the deed under which the latter claimed was void makes no difference. Her possession was adverse, for she was in actual personal possession; and the fact of possession and the *quo animo* of the possessor are the tests by which to determine the question whether the possession is adverse or not: *La Fomboir* v. *Jackson*, 8 Cow. 589. Mary E. Bull, therefore, has never parted with the legal title to this property. The only deed she has ever made was that to Welch, and that was void. She is therefore, beyond all question, a proper party to this suit.

Of course it follows that as Welch took no title to this property, he has no interest of any kind, and therefore should not have been joined. But this fact was apparent on the face of the bill, in connection with the fact of Mrs. Gallagher's possession, which was well known, of course, to her and Smith, her co-respondent. This objection should, therefore, have been taken in an early stage of the case. The respondents answered to the merits alone. They should have taken advantage of the misjoinder of Welch in their answer. (Lord LANGDALE, in the case of *Raffity* v. *King*, Vol. 6, Law Journal N. S. 93.) His misjoinder in no way embarrasses the respondents, nor can it in any manner affect the propriety of the decree. It will, therefore, be disregarded.

On the hearing the complainants exhibited the forged deed described in the bill, and proceeded to prove by Mrs. Bunce that the signature purporting to be hers was a forgery. They also offered Mr. Gardiner, who made the certificate of acknowledgment on the forged instrument, to prove that the person who executed it was not Mrs. Bunce, the real owner, although he supposed so at the time. To this evidence the respondents objected on the ground that it was not competent for the complainants thus to discredit papers which they had produced in evidence. But the rule upon which this objection rests has no application to a suit of this character. The complainants are no parties to these instruments, and are therefore at liberty to prove their spurious character.

Let a decree be entered in accordance with the prayer of the bill against both respondents. No costs will be allowed against the respondent Smith.